

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

**DETERMINATION OF ROYALTY RATES
AND TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(*Phonorecords IV*)**

**Docket No. 21-CRB-0001-PR
(2023-2027)**

JOINT MOTION TO MODIFY THE CASE SCHEDULING ORDER

Pursuant to 37 C.F.R. § 351.5(a), the undersigned participants (“Movants”)¹ in the above-referenced proceeding (“Proceeding”) jointly move the Copyright Royalty Judges to modify the Case Scheduling Order. *See* Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order (February 9, 2021) (“Case Scheduling Order”).

Movants submit this joint motion because the Case Scheduling Order sets a deadline for written direct statements that Movants believe may prove unworkable in practice—particularly given that several of the participants in this Proceeding are simultaneously litigating the ongoing *Phonorecords III* remand proceeding. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (*Phonorecords III*), No. 16-CRB-0003-PR (2018-2022) (“*Phonorecords III* Remand Proceeding”). Movants respectfully request the benefit of the entire period allowed for by statute for the development of their written direct statements—specifically, until October 13, 2021. *See* 17 U.S.C. § 803(b)(6)(C)(i) (requiring that written direct statements

¹ The Movants include Spotify USA, Inc., Amazon.com Services LLC, Google LLC, Pandora Media, LLC, Apple Inc., the National Music Publishers’ Association, Inc., the Nashville Songwriters Association International, and George D. Johnson d/b/a George Johnson Music Publishing.

be filed “not later than 5 months . . . after the end of the voluntary negotiation period”). Appendix A to this motion compares the dates set forth in the existing Case Scheduling Order (left-hand column) with the revised dates requested by the participants (right-hand column). As addressed below, Movants have largely adjusted the remaining case deadlines in direct proportion to their requested extension to the written direct statement deadline; Movants propose no other major changes to the case schedule. Indeed, Movants have made every effort to adhere as closely as possible to the overall time parameters set forth in the Case Scheduling Order.

Movants thus believe good cause exists for the Judges to modify the Case Scheduling Order by adopting the dates shown in Appendix A.²

* * *

Filing of Written Direct Statements. The Case Scheduling Order directs the participants in this Proceeding to file their written direct statements on Friday, September 10, 2021. Movants request a 33-day extension of this deadline to Wednesday, October 13, 2021. This extension is consistent with the approach the Judges have taken in prior proceedings.³ It is especially warranted here, given that several of the participants in this Proceeding are concurrently litigating the *Phonorecords III* Remand Proceeding. Given the burden and challenge of simultaneously litigating two proceedings at once—and consistent with the Judges’ Order Denying Motion for

² See Case Scheduling Order at 2 (“At any time, a participant may file a motion stating good cause to vary the schedule, within the dictates of the statute, or to propose important proceeding dates not stated in [the case schedule].”).

³ In *Web IV*, the parties filed written direct statements on October 7, 2014. See No. 14-CRB-0001-WR (2016-20) (“*Web IV*”), Exhibit A to the Order Extending Discovery Period and Revising Case Schedule (December 10, 2014) (“Second Amended Case Schedule for Web IV”). In *SDARS III*, the parties filed written direct statements on October 19, 2016. See No. 16-CRB-0001-SR/PSSR (2018-2022) (“*SDARS III*”), Attachment A to the Order for Further Proceedings and Case Scheduling (June 28, 2016) (“Modified Case Schedule”).

Suspension of Voluntary Negotiation Period and Subsequent Case Events (May 13, 2021)⁴—Movants request the benefit of the entire statutory period for written direct statements. *See* 17 U.S.C. § 803(b)(6)(C)(i) (requiring that written direct statements be filed “not later than 5 months . . . after the end of the voluntary negotiation period”). Movants therefore request that the Judges extend the deadline for written direct statements to October 13, 2021—five months after the May 13, 2021 conclusion of the voluntary negotiation period. *See* Case Scheduling Order.

Discovery Period. Under the existing Case Scheduling Order, discovery would begin on September 10, 2021, the same day written direct statements are due, and end on November 9, 2021. The participants request an extension of these dates to October 24, 2021 and December 23, 2021, respectively. This proposed change follows from the proposal to extend the deadline for the filing of written direct statements by 33 days to October 13, 2021. Movants also request a brief, additional period before discovery begins so that the participants may review the (usually voluminous) written direct statements filed before the already tight 60-day discovery window prescribed by statute begins. *See* 17 U.S.C. § 803(b)(6)(C)(iv).⁵ This requested additional period between the deadline for written direct statements and the start of discovery is consistent with

⁴ *See* May 13 Order at 2 & n.1 (recognizing that “the impact . . . of the *Phonorecords III* remand proceedings on the scheduling in this proceeding would be better addressed by the parties as that proceeding moves forward” and that “[a]ccordingly, the Judges issue [the] Order without prejudice to any future motion by any party seeking an extension of deadlines that now exist, or to otherwise supplement the schedule of this Proceeding.”).

⁵ The Judges permitted similar case schedule modifications in *SDARS III*, *Web IV*, and *Web V*. In *SDARS III*, the Judges extended the deadline to file written direct statements and the commencement of discovery—both October 7, 2016 under the original scheduling order—to October 19, 2016 and October 21, 2016, respectively. *See SDARS III*, Modified Case Schedule. In *Web IV*, the Judges set October 9, 2014 as the start of discovery, two days after the October 7 deadline to submit written direct statements. *See Web IV*, Second Amended Case Schedule for Web IV. In *Web V*, the Judges set September 27, 2019 as the start of discovery, four days after the September 23 deadline to submit written direct statements. *See* No. 19-CRB-0005-WR (2021-2025) (“*Web V*”), Order Modifying Case Schedule.

Section 803, which contemplates the passage of at least some time between when participants file their written direct statements and the commencement of discovery. *See* 17 U.S.C. § 803(b)(6)(C)(ii)(I) (“Following the submission . . . of written direct statements and written rebuttal statements by the participants . . . the Copyright Royalty Judges, after taking into consideration the views of the participants in the proceeding, shall determine a schedule for conducting and completing discovery.”). Movants’ request further ensures that subsequent deadlines triggered by the conclusion of discovery do not fall too close to any of the winter holidays.

Settlement Conference Period. The Case Scheduling Order provides that the settlement conference period will take place from December 27, 2021 through January 17, 2022. In accordance with Movants’ requested extension of the deadline for the filing of written direct statements, Movants request that the Judges move the start date of the settlement conference period by a corresponding 33 days to January 31, 2022. The settlement conference period would then conclude on February 21, 2022. Movants’ proposed deadline is appropriate under Section 803, which requires that the settlement conference be held “during a 21-day period following the 60-day discovery period specified in clause (iv)[.]” 17 U.S.C. § 803(b)(6)(C)(x).⁶

Filing of Amended Written Direct Statements. The Case Scheduling Order requires the participants to file their amended written direct statements on Wednesday, November 24, 2021. Given the extension of the preceding deadlines, Movants request a corresponding extension to the deadline for the filing of amended written direct statements to Friday, January 7, 2022. As required

⁶ The statute does not require that the settlement conference period begin immediately after the close of discovery. *See* 17 U.S.C. § 803(b)(6)(C)(x). Indeed, in the existing Case Scheduling Order, the settlement conference period starts 48 days after the end of discovery.

by statute, this date is 15 days after the December 23, 2021 proposed deadline for the conclusion of discovery. *See* 17 U.S.C. § 803(b)(6)(C)(i).

Filing of Written Rebuttal Statements. The Case Scheduling Order directs the participants to file their written rebuttal statements on Monday, December 27, 2021. The participants request a 33-day extension of this deadline to Monday, January 31, 2022—again, consistent with Movants’ requested 33-day extension to the deadline for the filing of written direct statements.

Deadline for Joint Settlement Conference Report. The Case Scheduling Order directs the participants to file a joint settlement conference report on Tuesday, January 18, 2022. The participants request an extension of this deadline to Tuesday, February 22, 2022. This proposed deadline reflects the overall proposed shift in case schedule deadlines, and follows one day after the conclusion of the settlement conference period, as in the Judges’ existing Case Scheduling Order.

* * *

For the reasons stated above, the Movants request that the Judges accept their proposed alternative schedule, attached as Appendix A.⁷

⁷ To the extent the Judges have any concerns about particular aspects of Movants’ proposed schedule, Movants would appreciate the opportunity to address those concerns in a revised proposal.

DATED: June 28, 2021

Respectfully submitted,

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APPENDIX A

Appendix A

Case event	Judges' Date	Proposed Date
Initiation (publication in FR)	January 5, 2021	January 5, 2021
Deadline for petitions to participate	February 4, 2021	February 4, 2021
Commencement of Voluntary Negotiation Period	February 12, 2021	February 12, 2021
End of Voluntary Negotiation Period	May 13, 2021	May 13, 2021
Parties' Notice Regarding Settlement	May 18, 2021	May 18, 2021
If Parties Do Not Settle:		
Exchange of Preliminary Disclosures	[timing and substance subject to negotiation between participants]	[timing and substance subject to negotiation between participants]
Non-Settling Parties file Written Direct Statements	September 10, 2021	October 13, 2021
Commencement of Discovery Period	September 10, 2021	October 24, 2021
End of Discovery	November 9, 2021	December 23, 2021
Settlement Conference period	December 27, 2021- January 17, 2022	January 31, 2022 February 21, 2022
Deadline to file Amended Written Direct Statements	November 24, 2021	January 7, 2022
Deadline for Written Rebuttal Statements	December 27, 2021	January 31, 2022
Deadline for Joint Settlement Conference Report	January 18, 2022	February 22, 2022
Hearing	TBD	TBD
Proposed Findings and Conclusions	TBD	TBD
Responsive Findings and Conclusions	TBD	TBD
Closing Arguments	TBD	TBD
Initial Determination	not later than December 16, 2022	not later than December 16, 2022 ¹

¹ This motion does not propose making any changes to the Initial Determination deadline previously adopted. All parties reserve all rights and legal arguments relating to this date, including as to whether the *Phonorecords III* rates expire on a specified date.

Proof of Delivery

I hereby certify that on Monday, June 28, 2021, I provided a true and correct copy of the Joint Motion to Modify the Case Scheduling Order to the following:

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Signed: /s/ Joseph Wetzel